IN THE HIGH COURT OF UTTARANCHAL, NAINITAL.

No. 10- COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING.

[Chapter VIII, Rule 32(2) (b)]

Criminal Appeal No. 65/2003

Pushkar Singh	…	Appellants.
Vs.		
State of Uttaranchal	..	Respondent.

Decided on 12-08-2005

A.F.R. (Approved for Reporting)
~~Not Approved for Reporting~~

(Irshad Hussain, J.)

(J.C.S. Rawat, J.)

Dated: 12-08-2005.

In the High Court of Uttaranchal at Nainital.
Criminal Appeal No. 65/2003

Pushkar Singh S/o Laxman Singh,
R/o Naini P.S. Kotwali,
District Pithoragarh … Appellant.
Vs.
State of Uttaranchal … Respondent.

Sri Lokendra Dobhal, learned counsel for the appellant.
Sri A. Rab, learned Addl. G.A. assisted by Sri Amit Bhatt, learned A.G.A. for the State.

Coram: Hon'ble Irshad Hussain, J.
Hon'ble J.C.S. Rawat, J.

Dated: 12-08-2005

(Per: Hon'ble Irshad Hussain, J.)

Accused stand convicted and sentenced to imprisonment for life and fine of Rs. 5000/- under Section 302 I.P.C. and in default of payment of fine to further suffer R.I. for six month, per judgment dated 30-1-2003, passed by the then Sessions Judge, Pithoragarh in sessions trial No. 36/2000.

2- Briefly stated the prosecution case was that at about 8 P.M. on 24-6-2000 Pushkar Singh waylaid Tek Bahadur to give a blow of 'Gupti' (a sharp double edged weapon normally kept concealed in a cover) in his abdomen while Tek Bahadur was on his way to make some purchase from a shop and was then followed by his brother Samsher Bahadur and witness Deewan Singh, in village Naini of P.S. Kotwali, Pithoragarh. These witnesses challenged accused Pushkar Singh who, however, made his escape possible and could not be arrested. Injured Pushkar Singh was immediately shifted to the District Hospital, Pithoragarh for medical aid. According to the prosecution earlier in the morning accused and Tek Bahadur have had exchange of hot words when the clothes of accused got spoiled by tea overflowed from the cup of said Tek Bahadur.

3- After the incident the injured Tek Bahadur was shifted to the hospital and thereafter the written report, Ext. Ka. 1 was prepared informant Samsher Bahadur (P.W.1) who then delivered it at the Police Station at 9.50 P.M. the same day. On the basis of the written

report, check F.I.R. Ext. Ka.9 was drawn and case crime No. 869/2000 under Section 307 I.P.C. was registered vide G.D. Report No. 53 of the said date, Ext. ka.13. Investigation of the case was taken up by S.I. Ashok Sharma (P.W.7). He recorded the statement of injured Tek Bahadur at 10.40 P.M. in the surgical ward of the District Hospital, Pithoragarh and the statements of the other witnesses. The condition of Tek Bahadur deteriorated and his kidneys ceased functioning. He was referred to medical college, Lucknow for specialized treatment on 27-6-2000. while he was being taken to Lucknow on 28-6-2000 he breathed his last and his dead body was brought to the District Hospital, Pithoragarh and information was carried to the P.S. Kotwali, Pithoragarh through an official of the hospital and on this basis the case against the accused was altered to one under Section 302 I.P.C. vide G.D. Report No. 14 of 28-6-2000 of 8 A.M., Ext. Ka.25. The inquest on the dead body was then held by S.I. Ompal Singh (P.W.12) and inquest report, Ext. Ka.26 was prepared besides the other documents in that regard. The dead body was dispatched for post mortem which was performed at 10 A.M. on 28-6-2000 by Dr. D.S. Nabiyal (P.W.8) and post mortem report, Ext. Ka. 16 was prepared. On the person of the deceased the ante-mortem injuries detected were as under:-

1- Abrasion over left side elbow posterior aspect, size 1cm x 1cm.

2- Abrasion over right side elbow posterior aspect, size 1cm x 1cm.

3- Abrasion over left side leg above ankle anterior aspect, size 1cm x 0.5cm.

4- Stitched wound over midline of abdomen from pelvic to epigastrium, size 23cm in length.

5- Stitched wound over left side of abdomen, 4.5 cm away from umbilicus, obliquely of umbilicus to iliac-crest. Length was 1.5 cm.

On internal examination two stitched wounds found over left side abdomen on jejunum through, and through each wound having five stitches. Right chamber of the heart was full of blood whereas left

was empty. There was about 300 milliliters blood like fluid over peritoneum.

In the opinion of the medical officer cause of death could not ascertained so viscera was preserved.

4- When the injured Tek Bahadur was initially examined at District Hospital, Pithoragarh by Dr. J.S. Nabiyal (P.W.4) at 9.05 P.M. on 24-6-2000 and injury report Ext. Ka.4 was prepared, the following injuries were detected;-

1- Incised wound at left side abdomen, about 2" away from umbilicus. Size of wound was 1.5cm x .5cm, wound colour was reddish, mild swelling and tenderness present.

There was no distension of abdomen and was soft.

2- Blunt injury with contusion and abrasion at left side elbow joint. Tenderness was present.

3- Blunt injury with abrasion at right side elbow joint. Tenderness and mild swelling was present.

In the opinion of the Medical Officer injury No. 1 may be caused by 'Gupti'. The medical officer also opined that the injury could have been caused at about 8 P.M. the same day, that is, 24-6-2000. X-ray and ultrasound of the abdomen were also advised. According to the witness the injured was kept under observation and referred to the Surgeon.

5- Investigation of the case changed hands and finally S.H.O. Kotwali Devenera Singh Negi (P.W.10) was entrusted with the investigation of the case. Considering that on post mortem examination cause of death could not be ascertained Investigating Officer sent letter dated 26.7.2000, Ext. Ka. 17, to the Chief Medical Officer, Pithoragarh, asking for constitution of a Medical Board to determine the cause of death of the victim Tek Bahadur. Medical Board consisting of Dr. J.S. Nabiyal (P.W.4), Dr. D.S. Bankoti (P.W.5), Dr. D.S. Nabiyal (P.W.8), Dr. B.S. Yadav (P.W.9) was constituted by the Chief Medical Officer and the Board gave its report, Ext. Ka5 on 1-8-2000. It was countersigned by Chief Medical Officer Sri R.C. Arya. The Medical Board gave the opinion that the death of the victim Tek Bahadur was caused due to shock,

haemorrhage and acute failure as a result of ante-mortem stab wound in the abdomen.

6- After the accused was arrested he was interrogated on 11-7-2000 by the Investigating Officer and memo, Ext. Ka.23 was prepared. Accused Pushkar Singh volunteered to have the 'Gupti', the weapon of assault recovered on his pointing and therefore at his instance 'Gupti' material Ext. 1 was recovered on 19-7-2000 from a plot and close to the wire fencing of the Nainisain Air Strip within the circle of P.S. Kotwali, Pithoragarh. Memo of recovery, Ext Ka.3 was then prepared by S.S.I. Ashok Kumar Arora (P.W.11) and the same was signed by the witnesses who have seen the recovery being made on the disclosure statement of the accused. The 'Gupti' so recovered and other items were sent to Government Lab, Agra for chemical examination report. On completion of the investigation, charge sheet, Ext. ka.21 was submitted against the accused on 5-8-2000.

7- The accused was committed to court of Sessions and charge under Section 302 IP.C. was framed against him on 16.1.2001. He pleaded not guilty and contended that he has been falsely implicated due to enmity at the instance of witness Deewan Singh, the brother-in-law of the deceased. He gave out that 'Gupti' was not recovered at his instance and he was also not taken to the alleged place of recovery which according him was falsely foisted on him.

8. At the trial prosecution to bring home guilt to the accused relied upon the evidence of 12 witnesses including both eye witnesses Samsher Bahadur (P.W.1) and Deewan Singh (P.W.2). They supported the positive case of the prosecution that accused Pushkar Singh assaulted Tek Bahadur deceased by wielding a 'Gupti' and giving its blow in the abdomen of the victim at about 8 P.M. on 24-6-2000 near the house of Hari Ram in the locality known as 'Manukhola' of village Naini and thereafter fled away and could not be arrested. P.W.3, Ramesh Singh was examined as public witness of the recovery of the 'Gupti', Ext. 1. P.W.4, Dr. J.S. Nabiyal, P.W.5, Dr. D.S. Bankoti, P.W.8, Dr. D.S. Nabiyal and P.W.9, Dr. B.S. Yadav were examined to prove the medical aspect of the case in relation to the injuries sustained by the deceased and the reason as to how the sharp edged weapon injury proved fatal for the deceased. P.W.6, S.I.

Mahphooz Ali is also a witness of recovery of 'Gupti' P.W.7, S.I. Ashok Kumar Sharma partly investigated the case and also recorded the alleged statement of the victim Tek Bahadur in the hospital on 24-6-2000 under Section 161 of the Code of Criminal Procedure and filed true copy of the same as, Ext. ka.22 from the case diary. He also proved other steps taken in the investigation. P.W.10, Deputy S.P. Sri D.S. Negi and P.W.11, S.S.I. Ashok Arora also partly investigated the case. P.W.11 gave evidence of recovery of 'Gupti' at the instance of the accused and proved the statement of the accused recorded by him on 11-7-2000while the accused was under judicial remand and where-after he was taken on police remand and recovery was made on the disclosure statement on 19-7-2000. P.W.12, Sub Inspector Ompal Singh held inquest on the dead body of Tek Bahadur in the hospital on 28-6-2000 and prepared the inquest report, Ext. ka.26 and other relevant documents. The trial court appraised the evidence of the prosecution in an elaborate manner and although the dying declaration of the deceased was not acted upon, the trial court placing reliance on the other evidence and considering the entire material on record found the accused guilty and convicted him as aforesaid.

9- In support of the appeal, learned counsel for the accused submitted that the evidence of two so called eye witnesses, P.W.1 and P.W.2 was not credible as they were the interested witnesses of the incident as being related to the deceased and their evidence should not have been relied upon by the trial court. It was further submitted that the evidence of recovery of 'Gupti' the alleged weapon of assault was infirm and discrepant and this piece of evidence was also wrongly taken into consideration towards proof of the prosecution case against the accused. Learned counsel then submitted that even if it has to be held that the accused inflicted injury in the abdomen of the deceased the same was not caused with the intention to kill and further that the accused could not have been attributed that knowledge that the death of the victim will be the inevitable result of the single blow given and therefore the accused could have at the most been held liable for commission of an offence punishable under Section 304 Part-II I.P.C. instead of Section 302 I.P.C.

10- As against this, learned A.G.A. supported the judgment of the trial court and submitted that the judgment is well reasoned and no interference is called for. In this backdrop the evidence of the prosecution need to be reviewed and reappraised to arrive at an independent conclusion whether the accused assaulted and inflicted injury of 'Gupti' in the abdomen of the deceased at the time and place as alleged by the prosecution and that the injury was sustained with the intention of causing the death of the victim making the accused liable for conviction under Section 302 of the Indian Penal Code.

11- Before considering the evidence of eye witnesses P.W.1 Samsher Bahadur and P.W.2 Deewan Singh from the point of view of trustworthiness of their evidence, it need to be stated that P.W.1 is the real brother of the deceased and whereas the sister-in-law of P.W.2 is married to the cousin brother of the deceased as stated to by this witness. Therefore, instead of doubting the prosecution case for want of independent witness, we have to consider the broad spectrum of the prosecution version and to adopt a cautious approach and to carefully scrutinize the evidence of these related eye witnesses.

12- Both P.W.1 and P.W.2 gave definite evidence to corroborate the positive case of the prosecution that the accused Pushkar Singh gave 'Gupti' blow in the abdomen of Tek Bahadur at about 8 P.M. on 24-6-2000 in village Naini and they saw the incident while they were coming behind Tek Bahadur near that place. They also gave out that the place of the occurrence was near the house of Hari Ram and other residential houses were also situate in that locality known as 'Maunkhola' of village Naini. According to them the accused while giving 'Gupti' blow to the deceased also retorted that the deceased was spared in the morning but this time he is not going to spare him and after inflicting the injury fled away towards Naini village. Both the witnesses having seen all this rushed near the deceased and shifted him immediately to the District Hospital, Pithoragarh for medical aid. To discredit the testimony of these witnesses learned counsel for the accused argued that the occurrence took place in the night hours and source of light not being disclosed in the written report, Ext, Ka.1, the claim made by these witnesses that they saw the incident and identified the assailant of the deceased, was highly

doubtful and the trial court made an error in placing reliance on their evidence. No doubt source of light does not find mention in the written report, but witness Samsher Bahadur categorically stated that at the time of incident he was carrying an electric torch and in its light the incident of assault was witnessed. The torch of the witness was found in working order by the investigating Officer when it was inspected and returned to this witness on 25-6-2000 vide memo, Ext. Ka. 2 as is stated to by the witness also. Accused was known to these witnesses from before the occurrence and there is no dispute about it. The deceased was residents of village Oadmatha and according to P.W.1 his village is situate at a distance of only one kilometer from village Naini in the vicinity of which the occurrence took place. Accused is residents of village Naini to which place eye witness Deewan Singh also belong. When the accused was known to these eye witnesses very well, they could have easily fixed his identity in the electric torch light from as sufficient distance which according to P.W. 1 was about three meters between them and the place of actual assault by the accused. Therefore, in the face of the definite evidence of the witness P.W.1 about the source of light with him and the same having been inspected by the Investigating Officer also, we do not think that the omission of the source of light in the written report, Ext. Ka. 1 can safely be taken to disbelieve the otherwise reliable evidence of these eye witnesses.

13- The village of the incident named as Naini is situate at a distance three kilometers from Police Station, Kotwali Pithoragarh. It is in the evidence of both P.W.1 and P.W.2 that soon after the incident they brought the injured Tek Bahadur to the District Hospital, Pithoragarh for medical aid. The evidence of Dr. J.S. Nabiyal (P.W.4) prove that injured Tek Bahadur was brought to the hospital and was examined by him at 9.05 P.M. on 24-6-2000. He also prepared injury report, Ext. Ka.4 in which itself it is mentioned that the injured was brought to the hospital by Samsher Bahadur the elder brother of the injured and Deewan Singh another relative of the injured. Considering the distance of three kilometers between the villager of occurrence and Pithoragarh city where the hospital is situate and also considering the fact that these two eye witnesses were able to

bring the injured to the hospital by 9.05 P.M. clearly indicate that it was possible only on account of these two present there at the scene of the occurrence and were thus able to shift the injured to the hospital from there in such a short period. This aspect of the matter is an inbuilt assurance to the claim about the presence of these witnesses at the scene of the occurrence apart from their own definite and cogent evidence in that regard. In other words both these witnesses being the most probable and natural witnesses of the occurrence their clear and cogent evidence was rightly found to be trustworthy by the trial court and we find ourselves in agreement with the said view and at the same time to reject the contrary argument of the learned counsel for the accused.

14- The occurrence took place near the house of Hari Ram where according to these eye witnesses other houses situate are of Keshar Singh and Joga Singh and according to them none of the occupants of these houses came out at the time of the incident. Learned counsel argued that since no independent witness was coming forward to support the prosecution case these witnesses were made to state like this and in the totality of the circumstances of the case the evidence of these interested witnesses should have been discredited by the trial court. We see no merit in this argument also because the incident of assault took place on the village pathway and it must have taken less than a minute for the accused to give a single ‘Gupti’ blow in the abdomen of the victim and thereafter to run away from there and thus it was very unlikely for any of the occupant of those house of the come out and see the actual occurrence except the two eye witnesses who happened to be behind the victim at that time and saw the incident. Therefore, the absence of any independent witness to support the prosecution case was very natural and rather this aspect of the matter bring an element of credibility to the prosecution claim that no attempt was made to falsely induct any independent witness and to examine him to prove the prosecution case. In other words the prosecution clearly appear to have come up with clean hands by that keeping in view the time taken in the assault, the site of the incident which was a pathway and that there was no commotion or noise by raising of any alarm at the time of the incident the only natural and

probable witnesses were these two, P.W.1 and P.W.2, who were coming from behind the deceased and thus had the occasion to witness the occurrence.

15- Learned counsel next referred to the statement of P.W.2, Deewan Singh who gave out that soon after the incident Tek Bahadur in injured state was brought to the shop of one Umed Singh situate at a distance of 30 meters from the place of incident, to bring home his point of view that this shopkeeper could have been an independent witness of the relevant fact to lent credence to the evidence of the eye witnesses but this shopkeeper was also neither named in the F.I.R. nor examined by the Investigating Officer knowing it well that this shopkeeper would not have affirmed the presence of these eye witnesses at the scene of the occurrence. In our view this instance in the evidence cannot also be taken to discredit the claim of the prosecution and the evidence of the eye witnesses, because the shopkeeper Umed Singh has not seen the incident and his evidence could not have been very relevant and material about the actual occurrence Therefore we do not agree with the submission that the independent witnesses were deliberately not inducted and examined in the case and that on this account the evidence of these two witnesses was not sufficient to prove the case of the prosecution against the accused.

16- This aspect of the matter may also be considered by another angle. Experience show that people in general show apathy as and when such occurrence takes place and they even refrain themselves to come forward to help the victim and avoid to be nominated as witness of the occurrence. The reason being that the people in general do not want to involve themselves in the dispute between two individuals and the investigating agency normally find itself handicapped to bring forward the so called independent witness of an incident. This is the reason that the courts have laid emphasis that the evidence of interested witness cannot be discarded merely on that account but evidence of such witness is required to be scrutinized with care and caution and if the evidence of the interested witness is found to be otherwise reliable the same can be acted upon to draw a positive inference in favour of the prosecution claim. In the instant case both

the witnesses were subject to searching cross-examination and nothing of vital importance as may assail their credibility seem to have been brought on record and keeping in view the settled legal yardstick we feel no hesitation in coming to the conclusion that the evidence of the both these eye witnesses P.W.1 and P.W.2 on being carefully scrutinized prove beyond doubt that accused Pushkar Singh inflicted ‘Gupti’ blow in the abdomen of the deceased Tek Bahadur at the said time and place and later-on on account of the injury as proved by the medical evidence in the case, the victim breathed his last at the time mentioned above.

17- The trial court was also justified in placing implicit reliance on the evidence of these witnesses to draw the inference that the accused was the author of the injury of the deceased and which resulted in his death. The inference also lent credence to by the evidence of recovery of the ‘Gupti’, material Ext.1 on the disclosure statement of the accused. The evidence in regared to the recovery as contemplated under Section 27 of the Evidence Act was found reliable by the trial court. Having considered this aspect of the matter in the light of the material on record, we see no reason to disagree with the conclusion drawn by the trial court. The reason being that we see no substance in the argument of the learned counsel for the accused that the public witness Ramesh Singh (P.W.3) of the recovery was declared hostile and the evidence of police witnesses S.I. Mahphooz Ali (P.W.6) and S.S.I. Ahok Aroa (P.W.11) warranted rejection on account of their being interested in the success of the efforts of the prosecution. First of all it need to be stated that although public witness Ramesh Singh was declared hostile on account of his attempt to help the accused by saying that the person on whose instance the recovery of ‘Gupti’ was made from the place mentioned in the earlier part of the judgment was brought there ‘Bap[arda’. Despite this the evidence of the witness was not washed off the record in view of his admission that he knew the accused Pushkar Singh from before and also identified him in the court at the time of giving the evidence. He also gave out that the name of the accused who got the ‘Gupti’ recovered was told by the police personnel as Pushkar Singh. The witness also admitted his signatures on the memo of recovery of ‘Gupti’, Ext. Ka.3 and further

identified the ‘Gupti’, material Ext-1 to be the same which was then recovered at the instance of the accused on 19-7-2000 in the presence of another public witness and police personnel. The witness was also confronted with his earlier statement under Section 161 of the Code of Criminal Procedure which was to the effect that the ‘Gupti’ was recovered on the pointing of the accused and he admitted that the statement was correctly given to the Investigating Officer. All these aspects thus indicate that his attempt to help the accused on account of acquaintance with him has failed and his evidence amply support the prosecution case about the recovery.

18- In regard to the above fact we also find it necessary to mention that the evidence of S.S.I. Ashok Arora (P.W.11) prove that on 11-7-2000 the accused was interrogated while he was in judicial custody and the accused then gave out that he has concealed the ‘Gupti’ after the commission of the offence at the periphery of the Nainisaini air strip and precisely in the ‘Kilmora’ bushes at that place in the town of Pithoragarh and he volunteered to have the same recovered. The witness filed the copy of the statement, Ext. Ka.23 from the case diary parcha dated 11-7-2000 and its narration prove that the accused made statement to the above effect. Further, when the accused was taken on police remand on 19-7-2000 and when he proceeded to have the ‘Gupti’ recovered even at that time also he made similar disclosure before the witnesses which find place in the memo of recovery, Ext. Ka.3. This way the requirement of the provision of Section 27 of the Evidence Act was satisfied in the sense that accused was the author of the concealment of the ‘Gupti’ and on his pointing from the place of the concealment the said weapon of assault, Ext-1 was recovered in the presence of these witnesses. The evidence of second police witness S.I. Mahphooz Ali also affirm the positive case set up by the prosecution in that regard and the entire evidence on the record was considered and appraised by the trial court in proper legal perspective. We do not find any element of planting of the ‘Gupti’ by any got up evidence of the prosecution and there can be no gain saying that our affirmation to the view of the trial court is warranted by the material on record.

19- It was then argued that the ‘Gupti’ was sent to Serologist and report, Ext. ka.20 indicate that although there was blood on this object but the same having been found disintegrated the origin as to whether it was human blood or not could not be confirmed and this aspect of the matter belie the claim of the prosecution that this ‘Gupti’ was the weapon of the assault. It appear that due to lapse of time between the date of the occurrence and the date of the recovery the origin of the blood could not be confirmed as the blood got disintegrated but at any rate the overwhelming reliable evidence of the prosecution about the recovery of this object at the instance of the accused can reasonable be taken to observe that the ‘Gupti’ got recovered was the weapon of assault wielded by the accused. As said above this piece of the evidence weightage to the credibility of the ocular evidence discussed above and it further connect the accused to the offence committed against the victim of the case.

20- we need not dilate upon the dying declaration allegedly recorded by the Investigating Officer by way of statement under Section 161 Cr.P.C. as the same was not acted upon by the trial court and in our view rightly so. we may add that statement, Ext. ka.23 is a detailed version of the prosecution case which was not expected to have been told by Tek Bahadur, while lying in hospital, whose condition even at the time of the admission in the hospital was not satisfactory as reported in the initial report, Ext. Ka.4 and he was even drowsy.

21- Referring to the large volume of the medical evidence of the case briefly referred above the learned counsel for the accused made a feeble attempt to dispute the claim of the prosecution that the death of the deceased was homicidal. As a result of post mortem examination on the dead body of Tek Bahadur the cause of death could not be ascertained and therefore viscera was preserved. The viscera was not sent to forensic lab and therefore on the request of the Investigating Officer, P.W.10 Medical Board was constituted and as referred in earlier part of the judgment, the Medical Board after considering the entire material and record of the treatment of the deceased gave an opinion that Tek Bahadur died due to shock, haemorrhage and acute renal failure as a result of ante-mortem stab wound in the abdomen.

Medical Officers examined in evidence were cross-examined at length but nothing of significance as may raise any suspicion in their said claim could be brought on record and therefore we also have no alternative but to accept the expert evidence that the acute renal failure was the direct result of the injury sustained in the abdomen in the incident by the deceased at the hands of the accused and that the death of the deceased was no doubt homicidal. The view of the trial court to this effect was also correct as being based on fair appreciation of the entire evidence on record.

22- As regards the motive aspect of the case is concerned, the evidence of P.W.1 and P.W.2 also support the prosecution case that in the morning there was some quarrel between the accused and the deceased and at the time of assault the accused said that the deceased was spared in the morning but now he is not going to be spared by him and this indicate that on account of the quarrel which took place in the morning the accused went out to assault the deceased. Learned counsel for the accused submitted that the motive alleged was very weak and it was not probable that due to petty quarrel on the issue of spoiling of the clothes by tea the accused would take such a drastic step. We see no force in this argument because it depends upon the attitude of a particular person as to how seriously he takes the petty dispute or quarrel and if by nature of his tendency and attitude the accused resoreted to assault the deceased there was nothing unusual in it. Even otherwise there being direct evidence of the assault in the case the question of motive loses its significance and the accused cannot derive any benefit by reason of the cause of the crime not being very strong and compulsive.

23- Upon an independent evaluation of evidence and material on record we find ourselves in entire agreement with the view taken by the trial court that the accused Pushkar Singh assaulted Tek Bahadur deceased at about 8 P.M. on 24-6-2000 in the vicinity of village Naini by wielding the ‘Gupti’ and causing him injuries which ultimately resulted in his death.

24- Learned counsel for the accused alternatively argued that the single injury inflicted on the deceased by the accused was not given with the intention to commit murder and that the evidence would not

escalate beyond culpable homicide not amounting to murder. To bring home his point of view learned counsel again drew attention to the medical evidence to suggest that in all probability the victim could not get proper and skilful treatment after he was admitted in the District Hospital, Pithoragarh and that this peculiar aspect of the matter cannot be overlooked in considering as to what offence was made out against the accused. Tek Bahadur was initially medically examined by Dr. J.S. Nabiyal (P.W.4) who stated to have stitched the abdomen taking it to be a simple cut without further probe about the internal damage to the organs such as intestine etc. The evidence of Dr. D.S. Bankoti (P.W.5) is to the effect that when complications arose the victim Tek Bahadur was operated upon by him in his capacity as a surgeon to do the job and it was found that the stomach was full of blood, there was injury at two places in the small intestine and there was also bleeding in the mesentery and these damages were then repaired According to him the operation was performed on 26-6-2000 and next day on 27-6-2000 further complication developed and had difficulty in passing the urine.Ultimately it was advised that the victim needs dialysis due to dysfunction of the kidneys and for this was referred to Medical College, Lucknow. The victim however breathed his last while he was yet to be taken to the Medical College, Lucknow and thus it was be the reason that despite the ante-mortem injury the actual cause of his death could not be ascertained by post mortem examination and the Medical Board on the basis of the entire medical record and effect of the abdominal injury gave the above opinion about the death. On the other hand learned A.G.A. persuasively argued that the accused was armed with a lethal weapon, a ‘Gupti’ and when he gave its blow on the vital part, the abdomen of Tek Bahadur deceased, it is evident that the accused intended to cause such bodily injury as he knew to be likely to cause the death of the said victim and his case squarely fall under clause secondly of Section 300 I.P.C. and therefore the accused having committed the murder was rightly convicted under Section 302 I.P.C. by the trial court. Attention was drawn to Explantion-2 to Section 299 I.P.C. to rebut the argument of the learned counsel for the accused. Explanation-2 of Section 299 I.P.C. reads as under:-

"Explanation 2.- Where death is caused by bodily injury, the person who cause such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented."

25- Having given our thoughtful consideration to the respective arguments in the backdrop of the entire evidence and broad spectrum of the case we do not think that the submission of the learned counsel for the accused is without merit and substance. The reason being that it is abundantly clear that the accused after giving single blow on the abdomen did not make any further assault or even an attempt to inflict another blow on the person of the deceased. We also cannot lose sight of the fact that the size of the incised wound was 1.5 cm x 0.5 cm x 0.5 cm indicating that the blow was not given with great force to cause maximum damage. The Physical character of the weapon of assault, Gupti, material Ext.1 recovered at the instance of the accused find place in the memo of recovery, Ext. Ka.3 and it is to the effect that the blade of the weapon is 16 cm long and blade is sharp double edged. It has wooden handle of 12 cm which facilitate making a complete and effective grip of the weapon. If this weapon was to be wielded with sufficient force an injury of much greater dimension causing extensive internal damage would have been the inevitable result and therefore we are convinced that the accused refrained from giving forceful blow and did not make any further assault on the victim despite there being no hindrance for him to do so as by that time there was no attempt by the eye witnesses to overpower him. Considering these aspects of the matter we are convinced that the accused inflicted single blow of 'Gupti' in the abdomen of deceased with the intention of causing such fatal injury as is likely to cause death and the offence committed by him was culpable homicide not amounting to murder under Section 304 Part-I I.P.C. instead of Section 302 I.P.C. Considering the totality of the circumstances of the case, sentence of R.I. for ten years and fine of Rs. 5000/- (five thousand) shall be sufficient to meet the ends of justice. In other words the appeal succeed partly.

26- In the result this appeal is partly allowed. The accused Pushkar Singh is convicted and sentenced to Rigorous Imprisonment for ten

years and fine of rupees five thousand and in default further R.I. for six months under Section 304 Part- I I.P.C. The judgment dated 30-1-2003 stand modified to this extent. The accused is already in jail and he shall suffer the sentence awarded against him.

27- Let the record be transmitted to the court concerned for compliance.

(J.C.S. Rawat, J.) **(Irshad Hussain, J.)**

ISB